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July 9, 2020

By ECF

The Honorable LaShann DeArcy Hall
United States District Judge
United States District Court
Eastern District of New York
225 Cadman Plaza East
Courtroom 4H North
Brooklyn, New York 11201

***Abrams, Fensterman, Fensterman, Eisman, Formato, Ferraro, Wolf & Carone LLP* v. *Valley Forge Insurance Company and CNA Financial Corporation*, No. 1:20-cv-02941 (E.D.N.Y.)**

Dear Judge Hall:

We represent Defendants and write pursuant to your Individual Practice III.A to request a pre-motion conference. For the reasons set forth below, Defendants request permission to promptly move for dismissal of Plaintiff's Complaint for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6). Under Individual Practice III.A.3, service of this letter constitutes timely service of Defendants' motion to dismiss the Complaint.

This is an insurance coverage dispute arising out of the COVID-19 pandemic. Plaintiff, a law firm, alleges that its property insurance policy with Valley Forge

Insurance Company ("Valley Forge") provides coverage for business interruption losses that Plaintiff claims it incurred due to restrictions imposed by the State of New York in order to promote social distancing and to slow the spread of the virus. Plaintiff also seeks coverage for losses that it claims to have sustained because certain of Plaintiff's employees tested positive for the virus, prompting Plaintiff to close its offices for cleaning. After Valley Forge denied Plaintiff's claim, Plaintiff filed this action seeking a declaration that the Policy provides coverage for the alleged losses.

Although COVID-19 has undoubtedly changed the daily practice of law in New York, there is no coverage for Plaintiff's alleged losses under the unambiguous terms of the Policy. For the reasons briefly discussed below, Plaintiff's claim fails on multiple grounds, all of which can be resolved on a motion to dismiss.

First, by its explicit terms, the Policy covers business income and extra expense losses *only* if those losses result from "direct physical loss of or damage to" the business personal property at Plaintiff's offices. New York courts have agreed that the policy language at issue—"direct physical loss or damage"—"unambiguously [ ] requires some form of actual, physical damage" for coverage to apply. *Newman Myers Kreines Gross Harris, P.C.* v. *Great N. Ins. Co.*, 17 F. Supp. 3d 323, 331 (S.D.N.Y. 2014); *Roundabout Theatre Co.* v. *Cont'l Cas. Co.*, 302 A.D.2d 1, 6 (1st Dep't 2002). Plaintiff has not alleged any such damage. *See Gavrilides Mgmt. Co.* v. *Michigan Ins. Co.*, Case No. 20-258-CB-C30 (Mich. Cir. Ct. July 1, 2020), *at* https://www.youtube.com/watch?v=Dsy4pA5NoPw&feature=youtu.be (dismissing a plaintiff's business interruption claim for alleged losses caused by the COVID-19 pandemic for failure to allege direct physical loss of or damage to its property).

Second, while the Complaint is unclear as to whether the coronavirus was present at Plaintiff's offices, even if Plaintiff *had* sufficiently alleged the virus's presence, the Complaint would still fail because Plaintiff cannot plausibly allege that COVID-19 tangibly altered its business personal property, as is required to trigger coverage under the Policy. *See Social Life Magazine, Inc.* v. *Sentinel Ins. Co. Ltd.*, No. 20 Civ. 3311 (VEC), Tr. at 4:25–5:4 (S.D.N.Y. May 14, 2020) (transcript of preliminary injunction hearing) (in action concerning alleged property damage caused by COVID-19, court held at oral argument: "There is no damage to your property. . . . [COVID-19] damages lungs. It doesn't damage printing presses."). While Plaintiff alleges that "COVID-19 physically infects and remains on surfaces of objects for up to twenty-eight days" (Compl. ¶ 18), according to CDC guidelines, "[c]oronaviruses on surfaces and objects naturally die within hours to days" and can be removed with "[n]ormal routine cleaning with soap and water" or killed with disinfectants. *See CDC Reopening Guidance for Cleaning and Disinfecting Public Spaces, Workplaces, Businesses, Schools, and Homes*, *at* cdc.gov/coronavirus/2019-ncov/community/reopen-guidance.html. The presence of a virus that can survive on surfaces for only a few hours or days and can be easily removed through ordinary cleaning or disinfectants is not "physical loss of or damage to" property required to trigger coverage. *See Mama Jo's, Inc.* v. *Sparta Ins. Co.*, No. 17-cv-23362-KMM, 2018 WL 3412974, at *9 (S.D. Fla. June 11, 2018) (finding no direct physical loss

or damage where business remained functional but required additional cleaning, noting that "cleaning is not considered direct physical loss").

Third, Plaintiff has failed to state a plausible claim to civil authority coverage. Civil authority coverage applies when a governmental authority prohibits access to the insured's property due to "direct physical loss of or damage to" property at locations *other* than the insured premises. For example, coverage may apply if a "building next door to [an insured] theater is damaged by fire; [and] for safety reasons, the civil authorities issue an order closing the [insured] theater during repairs to the adjacent building." *Syufy Enters.* v. *Home Ins. Co. of Indiana*, No. 94-0756 FMS, 1995 WL 129229, at *2 n.1 (N.D. Cal. Mar. 21, 1995). This coverage does not apply to Plaintiff's claims because the Executive Order referenced in the Complaint did not prohibit access to any property; it merely directed non-essential businesses to reduce their in-person workforces. Moreover, the Executive Order was not due to physical loss or damage at any property other than the insured premises; rather, it was due to the dangers that COVID-19 poses to human health. Plaintiff therefore is not entitled to civil authority coverage under the Policy.

Finally, the Complaint is deficient because Plaintiff has failed to state any claim against Defendant CNA Financial Corporation ("CNAF"). Plaintiff is seeking a declaration concerning the scope of coverage under its Policy with Valley Forge. CNAF is not a party to that contract, and CNAF owes no legal obligations to Plaintiff. Because CNAF and Plaintiff are not in privity of contract, and because the Complaint states no facts in support of any non-contractual theory of liability, CNAF is not a proper party to this action.[1]

We are available to discuss these issues with the Court at Your Honor's convenience.

Respectfully submitted,

/s/ H. Christopher Boehning
H. Christopher Boehning

cc: Matthew Didora, Esq. (by ECF)

[1] CNAF has on three occasions alerted Plaintiff to the fact that it is not a proper party through letters and an email from counsel. To date, Plaintiff has not responded.